92-1647

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

RISA C. MCCRAY

PETITIONER

VS.

CITY OF DAYTON, BOARD OF ZONING APPEALS,
ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DO THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES PRECLUDE THE LIMITING OF TESTIMONY AND EVIDENCE TO BE PRESENTED AT A PUBLIC HEARING WHEN SUCH LIMITATION WOULD PREVENT A FAIR AND IMPARTIAL HEARING?

2. DOES A BOARD OF ZONING APPEALS VIOLATE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE WHEN IT FAILS TO GUARANTEE A FAIR AND IMPARTIAL TRIAL BECAUSE IT IS NOT FUNCTIONING AS AN INDEPENDENT TRIBUNAL?

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United States Constitution,

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term 1992

RISA C. MCCRAY, PETITIONER

VS.

CITY OF DAYTON, BOARD OF ZONING APPEALS, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SUPREME COURT OF OHIO

OPINIONS BELOW

The Decision and Order of the Common Pleas Court of Montgomery County, Ohio appears in Appendix A. The unpublished opinion of the court of Appeals of Montgomery County, Ohio appears in Appendix B to this Petition. The Entry by the Ohio Supreme Court overruling the Memorandum in Support of Jurisdiction appears in Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Decision and Order of the Common Pleas Court of Montgomery County, Ohio was filed on November 8, 1991. A timely appeal to the Montgomery County Court of Appeals was filed on November 21, 1991. Pursuant to the opinion of the Court of Appeals, the Final Entry affirming the lower court's decision was filed on July 8, 1992. A timely Notice of Appeal to the Ohio Supreme Court was filed on August 7, 1992, and a Memorandum in Support of Jurisdiction to the Ohio Supreme Court was then filed on September 4, 1992. This Court's jurisdiction is invoked under Title 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Amendment XIV to the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE

The **Supreme Court of Ohio** had jurisdiction pursuant to 18 U.S.C. Sec. 3231. The Petitioner has owned property at 827 West Grand Avenue since 1977. She has operated it as a home occupation/law office and had a sign in her front yard since 1978 (transcript hearing, May 20, 1991, page 43)(hereinafter referred to as **T.May, p**). On or about January 16, 1991, Petitioner received a legal Notice of Violation from **Mr. Earnie DeWaters, the Zoning Inspector**, for having a free-standing sign in her yard without a sign permit. This **Notice of Violation** was followed by a letter from Steve Carne, the Zoning Administrator. Mr. Carne's letter informed the Petitioner that the free-standing sign was not permitted in the Historical District, and suggested that she have the sign redesigned (Transcript of Proceedings, List of Exhibits, Exhibit F). Prior to Mr. Carne's letter dated March 11, 1991, the Petitioner made efforts to have the sign redesigned with the Landmark Commission, but the redesigned sign was denied by the BZA (T. May, p. 37-38). The **City of Dayton Board of Zoning Appeals** (hereinafter referred to as the **BZA**), denied permission for Petitioner to redesign the sign and the Zoning Administrator ordered that the existing sign in Petitioner's yard be removed.

Petitioner filed a **notice of Appeal** with the BZA on April 8, 1991, contending that the Zoning administrator made a decision which did not allow the Petitioner ample opportunity to present evidence (Exhibit 1). A public hearing on the appeal was held on May 20, 1991, at which counsel for the Petitioner was to question witnesses and present evidence to support her case. Not during this hearing, **Mr. Turner,** the Chairman of the BZA, **refused to allow Petitioner's counsel to question Mr. DeWaters and Mr. Carne** (T.May, p. 8-10). He also refused to grant a continuance until Mr. DeWaters could testify. Id. at 15-17. During the whole hearing Mr. Turner's comments and interruptions of Petitioner's counsel **clearly indicated his bias in favor of the City.** (See e.g. T. May, p.23). Mr. Turner's biased attitude was a relevant factor in the BZA's decision sincerely the other members deferred to Turner and **asked for procedural instructions from him as well as the city zoning administrator and city attorney before making the final decision.** Id. at 49-52. Counsel requested that the BZA reconsider the case after her submission of a Supplemental Brief on the issues addressed at the hearing (Id. at 54). The BZA **deliberately decided not to wait until the Brief was filed,** and affirmed the Zoning Administrator's decision on May 20, 1991.

The BZA nevertheless told counsel for Petitioner to submit the Brief on Motion for Reconsideration on May 30, 1991.

Counsel for Petitioner was called on **June 3, 1991**, at approximately **11:00 a.m.** by the Secretary of the BZA and told that the Motion for Reconsideration would be held at **2:30 p.m.** Counsel for Petitioner attended the public hearing on June 3, 1991 as the Petitioner was scheduled to be somewhere else. After the testimony and discussion of a prior case, the BZA took a vote and reaffirmed its decision of May 20, 1991, (Id. at 24-26) which certified the Zoning Administrator's decision. Id. The BZA's Decision Order and Entry requiring the Petitioner to remove the sign was mailed to Petitioner on or about June 3, 1991.

On July 2, 1991, the Petitioner filed and appeal to the **Common Pleas Court of Montgomery County.** The Common Pleas Court affirmed the BZA's decision on September 8, 1991, and the Petitioner filed a timely appeal in the Court of Appeals of Montgomery County on November 21, 1991. The Court of Appeals subsequently **affirmed** the decision of the Common Pleas Court on July 8, 1992. The Petitioner filed a **notice of Appeal in the Supreme Court of Ohio on August 7, 1992**, which was followed by a Memorandum in Support of

Jurisdiction, filed on September 4, 1992. The Memorandum in Support of Jurisdiction was overruled on December 2, 1992.

REASONS FOR GRANTING THE WRIT

I. THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS CLAUSES PRECLUDE THE LIMITING OF TESTIMONY AND EVIDENCE TO BE PRESENTED AT A PUBLIC HEARING WHEN SUCH LIMITATION WOULD PREVENT A FAIR AND IMPARTIAL HEARING

Certiorari should be granted because this Petitioner presents an issue that has never been decided by this Court, and one with which the decisions of the lower courts conflict.

The Common Pleas Court of Montgomery County erred in holding that the Petitioner was given an adequate opportunity to present evidence and testimony because not only did the BZA limit the evidence and testimony because not only did the BZA limit the evidence Petitioner's counsel was allowed to introduce, but **the Chairman was already biased in favor of the City**, and thus influenced the rest of the Board. The administrative procedures used by the BZA violate an applicant/owner's right to Equal Protection and Procedural Due Process under both the Ohio Constitution and the Constitution of the United States. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> **. . .Nor shall any state deprive any person of life, liberty or property without due process of law; nor**

> **deny to any person within its jurisdiction the equal protection of the laws.**

The Fourteenth Amendment not only applies to the Federal and State Governments, but also to Municipalities because their administration constitutes state action. It is will established that the Fourteenth Amendment protects individual fundamental rights form abuse and deprivation by the government. In specifying what types of rights are fundamental, the court in Corfield v. Coryell, 6 F. Cas. 546, 4 Wash. C.C. 371 (1823) stated that:

> **. . .The right of a citizen of one state to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise; . . . to take hold and dispose of property, either real or personal; . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . Id. at 552.**

Thus, like any and every other citizen of the United States, **Petitioner has a constitutionally protected fundamental right to pursue her livelihood through her professional pursuits, and to have and hold** any real or personal property she acquires. The sign in the Petitioner's yard is as much a part of her property as the house that stands on the plot of land. Removing that sign would greatly hinder the Petitioner from pursuing her livelihood because a large percentage of her clients are walk-in clients who

see the sign in her yard and then come in to seek legal advice. The sign can also be seen from the intersection of two major avenues a few hundred feet from the Petitioner's property. Removing the sign from the yard would significantly decrease the number of potential clients who would see the sign and enter her office for legal consultation. It is unquestionable that the Petitioner has a legitimate claim of entitlement in her property (which includes the sign in her yard) under the Fourteenth Amendment, therefore any deprivation of such property by the State cannot occur without due process of law. **Board of Regents of State Colleges v. Roth**, 408 U.S. 564,570 92 S.Ct. 2701,2705 (1972). Such due process entails the **giving of notice and an opportunity for the citizen to be heard.**

Thus, applying these rules to the present case, when an applicant/owner files a Notice of Appeal to an Administrative Board and the Board provides the applicant with an opportunity to address the Board, the applicant should be given an opportunity to be heard on all matters relating to the case and issues before the Board. Here the Board denied the Petitioner an opportunity to be heard on all issues pertaining to the case before the Board. Petitioner had the burden of proving why the Zoning Administrator erred in his decision ordering the Petitioner to

remove the free-standing sign from her yard. However, the Petitioner was denied the right to meet that burden of proof when Mr. Turner, **refused to allow counsel for Petitioner to question Steve Carne and Earnie DeWaters**, about the legal notices received by the Petitioner (T. May, p.8-10).

Counsel for the Petitioner made several attempts to present evidence showing that the ordinances relied upon by the Zoning Administrator were retroactively applied Moreover, counsel for Petitioner made several attempts to question city employees about the legal Notice of Violations. However, one of the city employees was not present at the public hearing although present until 5 p.m. because he was requested to leave at 5:00 p.m. by his subpoenas because no overtime was to be paid. Petitioner's counsel requested a continuance on the matter until Mr. DeWaters could be present at the hearing. The request was denied after several questions by Mr. Turner as to why the witness was needed. (T.May, p. 15-17). In denying Petitioner's counsel the right to question Mr. DeWaters, Mr. Turner asked the Board whether they would like to grant a continuance, but **he asked it in such a way that the Board was already biased in favor of the City and did not make an independent and**

impartial decision since Turner had already stated that he did not feel that a continuance was necessary. (T. May, p.16).

It is the BZA's responsibility to apply the ordinance to matters presented before them, and to hear any and all evidence relating to whether the ordinance should be applied to the applicant/owner, as relates to the Zoning Administrator's decision. Further, the denial of such evidence denies the applicant a fair hearing which violates the applicant's right to due process of law. When counsel for Petitioner attempted to elicit evidence for her case from Mr. Carne, Mr. Turner, the Chairman of the Board, interrupted counsel and stated that **"This seems to be more of an inquiry than a presenting of a case."** (T. May, p.23). These comments made by Mr. Turner were indicative of his **partiality to the City of Dayton, and his impartiality to the Petitioner.** In addition, this attitude and conduct throughout the hearing prevented the Petitioner from having a fair and impartial hearing and building a record because **the Board members used the information they heard during the hearing to make their final decision, and therefore were influenced by Mr. Turner's biases which were in favor of the City.** Yet another indication of impartiality is the fact that Mr. Turner, as well as the rest of the Board, **asked the Zoning Administrator and the City**

lawyer for advice on how to vote, (T. May, p. 49), which reflects that the Board is simply a rubber stamp of any arbitrary and capricious action of the City. If the Board members do not know the proper procedures, they have no business serving on this Board, and cannot be impartial when the Board member ask the City attorney **"Is it acceptable"** (T. May, p. 50), obviously believing that they must please the City. **This is not the function of a supposedly independent and impartial board.**

In conclusion, the courts below erred in finding that the Petitioner had adequate opportunity to be heard and meet her burden or proof because the Common Pleas Court focused on the fact that there were two hearing, (Decision and Order, p. 4) but **ignored the proceedings that actually transpired during these hearings.** The procedures stated above clearly show that **the BZA violate the Petitioner's fundamental due process rights by limiting the evidence that the Petitioner could introduce, and the hearings were not fair and impartial** since Turner's comments show that he had already reached his decision before the hearings even began, and he then proceeded to verbalize his opinions throughout the hearing, thus prejudicing the Petitioner.

II. THE BZA VIOLATED THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE WHEN IT FAILED TO GUARANTEE A FAIR AND IMPARTIAL TRIAL BECAUSE IT WAS NOT FUNCTIONING AS AN INDEPENDENT TRIBUNAL

Under both the U.S. Constitution, not only must an individual be given notice and be heard before deprivation of life, liberty or property, but that hearing must be fair and impartial. in our case the **Petitioner was not given a fair and impartial hearing** because of the nature of the administrative procedures utilized by the **Zoning Administrator** and the **BZA**, which violate an applicant-owner's rights to equal protection and due process of law under the Fourteenth Amendment. The Zoning Administrator makes a decision about a violation without a hearing and opportunity for the applicant to present evidence on the case. Once the Zoning Administrator makes a decision denying the applicant request, the applicant must present his case to the **BZA**. The applicant presumes to be entitled to a fair an impartial hearing before the **BZA**. However, the public hearing before the **BZA is nothing more than a ratification of the Zoning Administrator's and the City Attorney's initial findings.** Thus, **there is not independence of the BZA** from the City and no opportunity for the petitioner to ever present

evidence at a fair and impartial hearing. The alleged public hearings held by the BZA only serve to permit the applicant to make a statement not to present evidence. Moreover, **the BZA is not an impartial body because on many issues the BZA has reached a decision prior to the hearing of any evidence.** This is reflected in the record by the **Chairman of the BZA** who was more interested in the expediency of the hearing rather than the content and of any arguments presented by the applicant. At one point **Mr. Turner, the BZA Chairman** asked the Petitioner's attorney how much longer her presentation would take, to which she estimated, about fifteen minutes. The Chairman then replied **"Okay. I'm going to hold you to that, Miss Vaughn. Please proceed."** (T.May, p.34). **He then insisted on holding Petitioner's counsel to those meager fifteen minutes even after she told him that it may take longer.** Id.

Hence the BZA did not provide the Petitioner with **a fair and impartial hearing** because **prior to taking the vote in the appeal, the BZA consulted the City Attorney and the Secretary as to the proper procedure.** (T.May, p.49-52). This action is improper because the City Attorney represents the Zoning Administrator and the City of Dayton whereas the BZA is **created to act solely as an independent body.** Since the

BZA agreed to permit the applicant to submit affidavits and a Supplemental Brief, the decision on the appeal should have been deferred until after the deadlines for the Briefs. Even though the BZA claimed it would amend its decision, if necessary, when the Brief was submitted, there was already a presumption that the Brief would not cause any change in the decision. It is highly unlikely that the BZA would have been inclined to re-evaluate the case at all even after the Brief would have amended its decision. Thus, **the rendering of a decision before the Brief was submitted was unconstitutional and violated due process of law.**

CONCLUSION

In conclusion, the Common Pleas Court erred in affirming the BZA's decision because **the BZA hearings violated the Petitioner's Fourteenth Amendment Equal Protection and Due Process rights.** The BZA **limited the testimony and evidence** to be presented at the public hearing. In addition, **the BZA did not reach its verdict independently, and relied on the advice of the City attorney and the Zoning Administrator**, thus **the Board could not guarantee impartiality and fairness** since it merely rubber-stamped the decision of the Zoning Administrator and the City attorney.

For the reasons set forth above, the Plaintiff-Petitioner hereby requests that the decision rendered by the Board of Zoning Appeals on June 3, 1991, be vacated and a new hearing set.

DATED: March 31, 1993.

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APPENDIX

APPENDIX A

CONSTITUTION
OF THE UNITED STATES
(Amendment XIV)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty of property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

RISA C. MCCRAY,	* CASE NO. 91-2846
	*
PLAINTIFF-APPELLANT	* JUDGE GILVARY
	*
VS.	* DECISION & ORDER
	*
CITY OF DAYTON, BOARD OF ZONING APPEALS,	*
	*
	*
DEFENDANT-APPELLEE	*

* *

Plaintiff-Appellant, Risa C. McCray, appeals from a City of Dayton Board of Zoning Appeals decision pursuant to O.R.C. Chapter 2506. The Board of Zoning Appeals affirmed the Zoning Administrator's decision that required the Appellant to remove a free-standing sign in her yard.

Appellant has owned property at 827 West Grand since 1977. She has operated it as a home occupation/law office since 1978. Appellant has had a sign in her front yard since 1978. (T. May, 1991 43). The area that Appellant resides in was legally designated a historic district in 1988. In 1988, free-standing signs in this area were prohibited by the Code of General Ordinances of the City of Dayton ("R.C.G.O.") section 150.249. (Tr., Exhibit H 2).

Prior to March 11, 1991, Appellant received two legal notices of violation from Mr. Earnie DeWaters, a zoning inspector, that the free-standing sign in her yard was illegal. (Tr., Exhibit K). On March 11, 1991, Mr. Steve Carne, the zoning administrator, issued a written letter to Appellant that informed her that free-standing signs were prohibited in the Historical District. (Tr., Exhibits F.). Appellant filed a Notice of Appeal with the Board of Zoning Appeals on April 8, 1991. The grounds stated for the appeal were as follows:

1. The denial of the free-standing sign would represent a financial hardship to her business;
2. A sign attached to the house, which is permitted in the district, is not practicable and would not be seen during summer months.

(Tr., Exhibit L).

On May 20, 1991, a public hearing on this matter was held. The Board of Zoning Appeals affirmed the Zoning Administrator's decision that required Appellant to remove her free-standing sign from her yard. On May 30, 1991, Appellant submitted a brief and a Motion for Reconsideration.

The Board of Zoning Appeals held another public hearing on June 3, 1991, to hear testimony in regard to Appellant's Motion for Reconsideration. After the testimony the Board of Zoning

Appeals reaffirmed its decision of May 1991. The Board of Zoning Appeals issued an order on June 3, 1991 that required Appellant to remove the sign. Appellant filed a Notice of Appeal to the Court of Common Pleas on July 2, 1991.

Appellant has raised three assignments of error in her appeal. In the first assignment Appellant contends that:
The City of Dayton cannot apply zoning ordinances retroactively in violation of Ohio Revised Code section 713.15.

O.R.C. section 713.15 provides in pertinent part:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such ordinance or amendment, but if any such non conforming use is voluntarily discontinued for two years or more, or for a period of not less than six months but not more than two years that a municipal corporation otherwise provides by ordinance, any future use of such land shall be in conformity with sections 713.01 to 713.15 of the revised Code. . . .

(Emphasis supplied).

This Court agrees with the Appellant that O.R.C. section 713.15 prohibits a zoning ordinance to be applied retroactively to a lawful use of any structure that existed lawfully at the time that the

zoning ordinance was enacted or amended. However, this C Court finds that the Appellant's free-standing sign was not lawfully existing in 1988 at the time R.C.G.O. section 150.249 was enacted.

R.C.G.O. section 150.400, which was in effect when Plaintiff-Appellant first erected a sign in 1978, requires that a sign permit be obtained for the erection, construction, or modification of all signs, excepting real estate signs. According to Mr. DeWaters, a zoning inspector, Appellant has never been issued a permit to erect a sign on her premises. (Tr., Exhibit K). Therefore, the free-standing sign in Appellant's yard did not exist lawfully at the time her property was included in the historical district in 1988. Accordingly, Appellant's first assignment of error is OVERRULED.

> Appellant's second assignment of error states:
> The Board of Zoning Appeals cannot limit the testimony and evidence to be presented at a public hearing if an applicant owner is to have a fair hearing on zoning appeals.

Appellant contends she was not given an opportunity to be heard on all issues pertaining to the case before the Zoning Board of Appeals. However, this Court finds that the record reveals that Appellant was given the opportunity to present evidence and testimony, which she did, at two separate hearings on the matter.

she was also granted leave to file a brief. Therefore, Appellant second Assignment of error is OVERRULED.

Appellant's third assignment of error states:

> The Board of Zoning Appeals cannot reconsider its prior decision on a case if the second hearing consisted of different board members.

The record reveals that at the first hearing on May 20, 1991, the Zoning Board of Appeals affirmed the zoning administrator's decision that required that Appellant remove her free-standing sign from her premises.

The record further reveals that Appellant's Motion for Reconsideration was granted and that she presented evidence and oral argument on this motion June 3, 1991. At the May hearing of the matter four board members were in attendance. At the June rehearing four board members were also present, but two of these members had not been part of the May panel. The Court finds that the evidence presented at the June hearing clearly established that the Plaintiff-Appellant's sign was not lawful, having been erected without a permit. Therefore the sign was not a valid pre-existing use entitled to protection from the retroactive effect of the historical zoning classification. Accordingly, Appellant's third assignment of error is OVERRULED.

For the foregoing reasons, Appellant's three assignments of errors are OVERRULED and the decision of the City of Dayton Zoning Board of Appeals is AFFIRMED.

SO ORDERED:

JAMES J. GILVARY
COMMON PLEAS JUDGE

APPENDIX C

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RISA C. MCCRAY	*	CASE NO. 13168
	*	(TIC. NO. 91-2846)
PLAINTIFF-APPELLANT	*	
	*	
V.	*	FINAL ENTRY
	*	
CITY OF DAYTON, BOARD OF ZONING APPEALS, ET AL.	*	
	*	
DEFENDANT-APPELLEE	*	

* *

Pursuant to the opinion of this court rendered on the 8th day of July, 1992, the judgment of the trial court is Affirmed.

Mike Fain
Presiding Judge

James A. Brogan
Appellate Judge

William H. Wolff, Jr.
Appellate Judge

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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RISA C. MCCRAY	*	CASE NO. 13168
	*	(T.C. NO. 91-2846)
PLAINTIFF-APPELLANT	*	
	*	
V.	*	
	*	
CITY OF DAYTON, BOARD OF ZONING APPEALS, ET AL.	*	
	*	
DEFENDANT-APPELLEE	*	

* *

Submitted for conference on the 28th day of May, 1992.

OPINION

RENDERED ON THE 8TH DAY OF JULY, 1992.

* *

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* *

FAIN, P.J.

Plaintiff-appellant Risa C. McCray appeals from the trial court's judgment affirming a decision of the Dayton Board of

Zoning Appeals (BZA). The BZA upheld the Zoning Administrator's decision requiring McCray to remove a free-standing sign in her front yard. The Montgomery County Court of Common Pleas, sitting in an appellate capacity pursuant to R.C. Chapter 2506, held that: (1) her sign did not exist lawfully at the time of the enactment of the Historic District ordinances in 1988, and so was not entitled to an exemption for a prior non-conforming use; (2) the record reflected that she had been allowed to present evidence and submit a brief on the issues; and (34) any alleged error in conducting a second hearing with different board members present was harmless because the evidence presented at the second hearing supported the decision.

We affirm.

I

McCray owns property at 827 West Grand Avenue in Dayton, Ohio, which serves both as her residence and law office. She established her law office in that location in 1978, and at that time placed a free-standing sign in her front yard identifying the premises as a law office. In 1986, the City of Dayton established that area as an Historic District and enacted ordinances imposing additional zoning restrictions. No one objected to the sign until 1989, when the Zoning Administrator served McCray with a Legal

Notice of Violation for the "installation of identification sign, without benefit of a permit, in the required front yard." She was told to remove the sign. Apparently, McCray did not appeal that notice, but neither did she permanently remove the sign. She testified that the only time the sign had been down was when vandals had broken the sign post.

In March, 1991, the Zoning Administrator denied McCray's application to allow the existing free-standing sign in her front yard, on the basis that all free-standing signs are prohibited in historic districts. McCray appealed that decision to the Board of Zoning Appeals. The Board, consisting of members Turner, Harmuth, Eiffert and Denney, heard the appeal on May 20, 1991. Witnesses were sworn and testimony was taken. One member of the public spoke against the application, and a representative of the Northwest Priority Board read a letter from the president of that board in favor of the application. At the conclusion of the testimony, the Board Chair closed the public hearing and indicated that no additional evidence would be received, but that McCray could submit a brief on the legal issues, and the decision could be reconsidered at the next meeting, if necessary. The Chair, Turner, said:

> *** [W]e can look at the Briefs that are filed and if it causes our decision to be changed, we can deal with that at our next hearing.

> There will be no public testimony at our hearing and no opportunity for counsel for the applicant or counsel for the City to speak on the merits of the case ***.

A motion was made, seconded, and carried unanimously to deny the appeal.

The Board, with Board Members Harmuth, Dillingham, Eiffert, and Roebuck present, met again on June 3 to consider a motion for reconsideration and the brief submitted on behalf of McCray. At that hearing, Earnie DeWaters was present, and the Board secretary indicated that testimony would be taken on the reconsideration. Counsel for McCray stated:

> Okay. My name is Navay Vaughn and for the record, I would like to indicate that we were not aware that the Motion for Reconsideration was going to be heard today at this public hearing and therefore we were not actually prepared to question Mr. DeWaters, but since he is here, we're going to go on forward on this Motion.

Counsel then elicited testimony from DeWaters and from Steven Carne, Zoning Administrator. Board Member Eiffert made a motion that the Zoning Administrator did not err in this decision, because the sign was never legal. That motion carried unanimously, and a decision and entry to that effect was signed. From that decision, McCray appealed to the Montgomery County Court of Common Pleas, pursuant to R.C. Chapter 2506. That Court

affirmed the decision of the Board, and McCray has appealed to this Court.

II.

A court of common pleas, hearing an administrative appeal, has the duty to determine whether there exists a preponderance of reliable, probative, and substantial evidence to support the decision of the administrative agency, and whether the order is unconstitutional, illegal, arbitrary, capricious, or unreasonable. Its review is a hybrid review and includes a consideration of the evidence and the possibility of receiving additional evidence. In reviewing the actions of a court of common pleas in administrative appeals, a court of appeals is limited to determining as a matter of law whether the decision of the trial court is supported by reliable, probative, and substantial evidence and is in accordance with the law.

Decisions supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. In re Annexation of 466.112 Acres (October 16, 1991), Montgomery App. No. 12567 (unreported) at 15-16. If there is evidence to support the decision of the court of common pleas and the decision is according to law, the decision must be affirmed.

McCray has not, pursuant to App. R. 16, assigned as error any actions of the Court of Common Pleas in affirming the decision of the Board of Zoning Appeals. In the interest of justice, however, we will infer that McCray's assignments of error in this court are that the trial court erred in overruling each assignment of error in this court are that the trial court erred in overruling each assignment of error, respectively, that McCray assured in connection with her appeal from the decision of the BZA.

III.

McCray's First and Second Assignments of Error are as follows:

THE BZA VIOLATED APPELLANT'S EQUAL PROTECTION AND DUE PROCESS RIGHTS BY LIMITING THE TESTIMONY AND EVIDENCE TO BE PRESENTED AT THE PUBLIC HEARING, AND THEREFORE DID NOT ALLOW APPELLANT A FAIR AND IMPARTIAL HEARING.

THE BZA COULD NOT GUARANTEE A FAIR AND IMPARTIAL TRIAL BECAUSE IT WAS NOT FUNCTIONING AS AN INDEPENDENT TRIBUNAL.

Because McCray makes similar arguments under both of these assignments of error, we will consider them together.

McCray appears to allege, relying on Board of Regents v. Roth, (1972), 408 U.S. 564, 570, 92 S. Ct. 2701, 2705, that her fundamental right to pursue her profession is a property right

entitled to protection under the Fourteenth Amendment to the United States Constitution, and that any deprivation of that right cannot occur without due process of law. Roth established the proposition that to have a property right in a benefit that is entitled to protection under the Fourteenth Amendment, a person must have more than a need or desire for it or unilateral expectation of it -- the person must have a legitimate claim of entitlement to it. Property interests are created by independent sources such as state law. Roth, 408 U.S. at 577, 92 S.Ct. at 2709. However , the case before us does not involve a benefit, and McCray has failed to articulate how the zoning decision deprives her of a legitimate use of her property or deprives her of her privilege of practicing law. Nonetheless, we conclude that the requirements of due process have been satisfied.

McCray argues that the Chairman of the Board of Zoning Appeals was already biased in favor of the City when he heard the evidence, and that he influenced that Board to agree with his opinion. She alleges that Michael Turner, the Chairman, refused to allow counsel to question Steve Carne and Earnie DeWaters regarding the legal notices of violation, that she was prohibited from presenting testimony showing that the zoning ordinances were retroactively applied, and that Turner's question to the board

members on whether to grant a continuance to give her the opportunity to question DeWaters was improper in that he had already stated his conclusion that a continuance was not necessary. We conclude that there was evidence in the record to support the trial court's determination that McCray was given the opportunity to be heard and that she received a fair hearing.

The Board gave McCray the opportunity to examine the witnesses who were present. With regard to DeWaters, Turner requested that counsel indicate what his testimony would be so that the Board court assess McCray's need for a continuance to elicit his testimony. Counsel was unable to articulate any facts that could not be established by McCray herself. It appeared that the purpose for DeWaters' testimony was to discuss the applicable law and the notices of violation. In asking for the Board's decision whether to grant a continuance, Turner said:

MR. TURNER: Well, I will ask the Board for a decision as to whether or not they would like to grant a continuance. Personally, it does not sound to me as if he has any evidence that is going to be necessary for the termination [sic] of this case.

MR. HARMUTH: Are you asking the Board?

MR. TURNER: Yes.

MR. HARMUTH: No, I don't think we should issue a continuance, then we'll proceed with this case.

MR. EIFFERT: I think we should just proceed.

MR. TURNER: Proceed? Okay. Counsel, we are going to proceed.

It does not appear that Turner was exerting any pressure on the other members of the Board, but was, instead, inviting their opinions on the issue of a possible continuance, after first having stated in his opinion. The Chairman has the right to vote on a procedural issue just as any other member of the Board. The transcript of the discussion on the proffer testimony and whether to grant a continuance was ten pages long. It was not a hasty decision, and the Board gave McCray's attorney many opportunities to show the relevance of the proffered testimony.

We find no error.

McCray argues that DeWaters' evidence would have shown that the ordinances were retroactively applied. However, she could have presented evidence herself showing that application of the 1988 ordinance to her sign, which was admitted, should have been barred because the sign was a prior non-conforming use. She failed to rebut the Zoning Administrator's testimony that she had never had a permit for a sign in her yard, and she failed to show that a

permit was not required for a sign in her yard when she erected the sign.

McCray, in addition to presenting testimony, evidence, and oral argument on May 20, was allowed to file a brief on the legal issues and to present additional evidence and additional oral argument at a subsequent hearing on her motion for reconsideration. The trial court did not err in finding that she had been given an opportunity to be heard and that her constitutional rights had not been violated.

We note also that, if McCray believed that she was not given an adequate opportunity to present evidence, she could have requested the trial court to hold an evidentiary hearing pursuant to R.C. sec. 2506.03. McCray failed to file an affidavit showing the applicability of one or more of the conditions recited in R.C. sec. 2506.03(A)(1)-(5) for a hearing to take additional evidence on appeal from decisions of administrative agencies.

McCray alleges that Turner asked the City's attorney for advice on how to vote, arguing that "the Board is simply a rubber stamp of any arbitrary and capricious action of the City." However, the question to which McCray refers was simply Turner's request for advice on the appropriate procedure to use in allowing McCray the opportunity to file a brief on the legal issues and for

reconsideration of the decision. McCray argues that the Board should have waited to make a decision until the June 3 meeting. McCray did not object to the procedure at the time, did not offer an alternative, and she has not shown how she was prejudiced by the decision. The Board in fact considered her brief and additional testimony at the June 3 hearing and reached the same conclusion. Milby simply provided advice, in the alternative, on procedures to use and gave no specific recommendation or advice on any idea relating to the merits of the decision. We see no error in the city attorney's having given procedural advice to the City Board of Zoning Appeals.

McCray argues that she was prejudiced because she was limited to fifteen minutes in presenting her case, after having given fifteen minutes as an estimate of the time she would need. The record reflects that she terminated her case in less than the fifteen minutes allotted to her. She has not shown that she needed, wanted or requested additional time to present her case.

We find that there is evidence in the record to support the judgment of the Court of Common Pleas. McCray's First and Second Assignments of Error are overruled.

IV.

McCray's Third Assignment of Error is as follows:

THE BZA ERRED IN AFFIRMING ITS DECISION OF MAY 20, 1991, WHEN IT VOTED ON A MOTION FOR RECONSIDERATION AT A JUNE 3, 1991 PUBLIC HEARING BECAUSE THE SAME BOARD MEMBERS WERE NOT PRESENT.

McCray argues, relying on Wright v. Bayowski, (1957), 78 O.L.A. 321, that the decision of the BZA in this case is null and void because those Board members present and voting on her motion for reconsideration on June 3 were not identical to those present and voting when the initial decision was rendered on May 20. This argument is without merit.

The Wright case is distinguishable. In that case, the Board held a public hearing in July, 1954, but issued no decision. In May, 1955, the Board, without a new hearing, issued no decision. In May, 1955, the Board, without a new hearing, issued a decision based on the July hearing. In the meantime, the Board had changed composition, so that only two members of the board at the time of the July hearing were still members of the Board in May, 1955. In addition, the minutes of the first meeting were not attested to, no decision was reached at the first meeting, the zoning inspector and clerk were not present at the second meeting, no notice had been given to the property owner of the second meeting, no findings of fact or conclusions of law were entered into the minutes, ten

months had elapsed since the original hearing, the second hearing was referred to as a "rehearing" of the matter, and McCray's Third Assignment of Error is overruled.

V.

All of McCray's Assignments of Error having been overruled, the judgment of the trial court is Affirmed.

* *

BROGAN and WOLFF, JJ., concur.

Copies mailed to:

NAVAY M. VAUGHN
STEVEN MILBY
HON. JAMES J. GILVARY

APPENDIX D

SUPREME COURT OF OHIO

1992 TERM

To wit: December 2, 1992

Risa C. McCray, Appellant,	*	Case No. 92-1796
v.	*	
	*	
City of Dayton, Board of Zoning Appeals, et al., Appellees.	*	ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Risa C. McCray.

(Court of Appeals No. CA13168)

Thomas J. Moyer
Chief Justice